Supreme Court, U. S.
FILED
MAR 16 1978
MICHAEL RODAK, JR., CLERK

No. 77-369

In the Supreme Court of the United States

OCTOBER TERM, 1977

FURNCO CONSTRUCTION CORPORATION, PETITIONER

v.

WILLIAM WATERS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

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INTEREST OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Federal enforcement of Title VII of the Civil Rights Act of 1964 has been vested by Congress in the Equal Employment Opportunity Commission, the Department of Justice and the Civil Service Commission. The Equal Employment Opportunity Commission has authority to bring civil actions against private employers under 42 U.S.C. (Supp. V) 2000e–5(f)(1). The Attorney General has enforcement responsibility when the employer is a state government, govern-

mental agency, or political subdivision. 42 U.S.C. (and Supp. V) 2000e–6. This case raises questions concerning the substantive reach of Title VII, the resolution of which may affect federal administration and enforcement of the Act.

STATEMENT

Furnco Construction Corporation ("Furnco") is a large contractor specializing in steel mill and blast furnace relining. In August 1971, Furnco entered into a contract with Interlake, Inc., to reline the larger of Interlake's two blast furnaces. Furnco's superintendent, Joe Dacies, had authority to hire bricklayers for the Interlake job. The choice of which bricklayers to hire was committed totally to Dacies' discretion (Pet. 3; Tr. 668–669, 693, 769).[1] Dacies had worked in the bricklaying trade since 1946 and had been a job superintendent for Furnco since 1965 (Tr. 768). His general practice is to hire bricklayers from a list which he maintains of men he considers competent based upon their work with him on prior relining jobs (known in the trade as "firebrick" work). Dacies described his hiring method as follows (Tr. 769):

> Well, I have a list of bricklayers. There are various notes, I don't have a direct file system, but it is people, prior to even working with Furnco, I had worked with bricklayers all over the country, and in this area. I have kept their telephone numbers, because they were good mechanics. So when I have a job, I try to contact them.

[1] "Tr." refers to the transcript of proceedings in the district court.

Dacies "[o]nce in a while" accepts recommendations from foremen or other superintendents (Tr. 770), but he does not accept or consider written or job-site applications from bricklayers because he always has enough men "on [his] list" to fill the jobs (Tr. 771). Dacies justifies his practice, which is common in the firebrick industry (Tr. 35–38),[2] primarily as a measure to ensure the hiring of competent firebrick workers (Tr. 771–772).

Although he had worked with black bricklayers on firebrick jobs (Tr. 343–344, 359–360, 773, 873), Dacies' list consisted entirely of white persons (Tr. 777–778).[3] But before the Interlake job started, Dacies was advised by Furnco's general manager, John Wright, that he should try to have at least 16 percent of the work done by competent black bricklayers (Tr. 675, 777–778). The company adopted this "affirmative action" goal in response to a suit by black bricklayers who had not been hired for a 1969 Furnco job (the *Batiste* litigation) (Tr. 673–674).[4] The

[2] Furnco expects its superintendents to hire bricklayers known by them and they generally do so (Tr. 669–672). If this method does not produce enough workers for the job, superintendents are expected to seek recommendations from other superintendents and workers (Tr. 671). On several occasions, some of Furnco's superintendents hired bricklayers who applied at the jobsite and also hired bricklayers who had no prior experience in firebrick work (Tr. 234–236, 314–315, 324–335, 509–510, 516, 561–563).

[3] Petitioner characterizes Dacies' list as "various notes," but concedes that "the names contained on such notes were of white bricklayers" (Pet. Br. 34, n. 29).

[4] See *Batiste* v. *Furnco*, 503 F. 2d 447 (C.A. 7), certiorari denied, 420 U.S. 928.

goal was intended to preclude additional lawsuits and was limited to Cook County where the company had been sued (Tr. 674–675).

Since Wright had stated that Furnco "would like to have black people on the job" (Tr. 777) and there were no blacks on Dacies' list, Dacies obtained references of black bricklayers from another Furnco superintendent in the area.[5] Between August 26 and September 27, 1971, Dacies hired four blacks who had been recommended to him and 37 whites from his list (Joint Exh. 1; Tr. 781–786). These 41 bricklayers were hired on a staggered basis. The first four bricklayers hired (between August 26 and September 8) were white, then a black was hired on September 9; 15 bricklayers were hired between September 10 and 18, of whom two were black; and 21 were hired between September 21 and 27, including one black (Joint Exh. 1). While this hiring was taking place, Furnco was in settlement negotiations with the *Batiste* plaintiffs (Tr. 677). The negotiations broke down in late September 1971, and Wright advised

[5] Dacies testified that he contacted the other superintendent "to see if he had black bricklayers that could do parts of this job in the blast furnace work. He said he thought that he had a few that could make it. He subsequently gave me some names and telephone numbers and I called them" (Tr. 778). When asked whether Interlake was the first job for which Dacies had ever hired black bricklayers, Dacies said: "I thought maybe it was the South Works job that I started to run * * * I thought there was two of them. I don't recall exactly, because I quit the job subsequently, very shortly after" (Tr. 875). Petitioner cites no other authority for its statement that Dacies hired "several" blacks on this earlier job (Pet. Br. 8 n. 8, citing Tr. 875).

Dacies to consider the *Batiste* plaintiffs when hiring resumed (Tr. 677–678, 778–779). Between October 12 and 27, 1971, Dacies hired 14 more bricklayers, including seven blacks involved in the *Batiste* case (Joint Exh. 1; Tr. 781–786). Overall on the Interlake job, 55 bricklayers were hired, 44 whites selected from Dacies' list and 11 blacks recommended to him by Wright and another Furnco superintendent. The work of the black bricklayers constituted 13.3 percent of the total man-days expended on the job (Joint Exh. 1).

William Smith, Donald Samuels and Robert Nemhard are three black bricklayers who unsuccessfully sought employment on the Interlake job (Pet. App. A17). Smith, a bricklayer for 30 years, had worked on many firebrick jobs; Furnco conceded his qualifications (Tr. 311–314). Before the Interlake job, Smith had worked with Dacies four times—1958, 1962, 1969 (for Furnco) and 1970–1971 (for Furnco) (Tr. 343–346, 359–360). On one of these jobs, Smith supervised Dacies (Tr. 785). Smith's name did not, however, appear on Dacies' list. Samuels was a bricklayer for 17 years (Tr. 227), and had worked on 6–8 firebrick jobs (Tr. 229), including one for Furnco in 1969–1970 on which Dacies also worked (Tr. 234, 874).[6] Samuels' name also did not appear on Dacies' list. Nemhard had been a bricklayer for 29 years; he had worked on one firebrick job for about two years, but not with Dacies or Furnco (Tr. 66–69, 72).

[6] Although Smith and Samuels had worked on certain Furnco jobs with Dacies, they had been hired by other superintendents (Tr. 235–236, 314–316).

Since neither Smith nor Samuels was included on Dacies' list, they were not among the past Furnco bricklayers whom Dacies called using his normal procedures. If any black bricklayers had been on Dacies' list, they would have been called by him and offered employment (Tr. 777–778). Smith and Samuels as well as Nemhard each applied for work at the Interlake job by going to the job-site in August 1971, before construction began (Tr. 73–74, 250, 327). Each returned to the job-site on a number of occasions during construction (Tr. 74–77, 251–259, 328–331). They applied "at the gate" because this is how they had been hired on earlier firebrick jobs (Tr. 72, 229–236, 311–316, 327). Nemhard also sent a written application to Furnco (Tr. 77–78).

Samuels and Nemhard were never hired on the Interlake job. Smith's attempt to obtain work by applying at the gate was also unsuccessful; but on October 12, 1971 (Tr. 350), he was hired at Wright's suggestion as one of the *Batiste* plaintiffs. After exhausting their administrative remedies before the Equal Employment Opportunity Commission, Smith, Samuels and Nemhard brought suit against Furnco under Title VII of the 1964 Civil Rights Act. Samuels and Nemhard claimed that they were not hired because of their race; Smith claimed that he was discriminatorily denied employment until the job was near completion.

Following an evidentiary hearing, the district court entered judgment for Furnco (Pet App. C). Focusing solely upon Furnco's refusal to consider respond-

ents' applications at the job-site and in writing, the court held that this practice was racially neutral, was not a pretext for excluding black bricklayers, did not have a disproportionate effect on black bricklayers,[7] and was justified as a business necessity (Pet. App. A16–A18).[8]

The court of appeals reversed (Pet. App. A), holding that Smith, Samuels and Nemhard had each established a *prima facie* case of discrimination under *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, and that the company's policy of hiring only bricklayers known by or recommended to its superintendent was neither legitimate nor non-discriminatory. The court viewed the practice as fraught with the potential for arbitrary and discriminatory decisions especially in light of the alternative of accepting applications in writing and checking references. The court held that because of historical discrimination against blacks, "it is *prima facie* racial discrimination to refuse to consider the qualifications of a black job seeker before hiring from an approved list containing

[7] The district court found that 5.7 percent of the bricklayers in the relevant labor force were minorities, relying on 1969 data in the "Chicago plan" which includes the five counties surrounding Cook County (Pet. App. A16). The court excluded respondents' evidence that the bricklayers' local union in Cook County was 13–14 percent black in 1973, and stated that, even if accepted, this figure would not be probative evidence of racial discrimination because 13.3 percent of the work at the Interlake job was performed by blacks (Pet. App. A16 and n. 1).

[8] Five other black bricklayers joined this lawsuit. The district court held that their claims were without merit (Pet. App. A16–A18), and the court of appeals affirmed (Pet. App. A3–A5).

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only the names of white bricklayers" (Pet. App. A7). Responding to the company's argument that there was no racial imbalance on the Interlake job, the court stated that respondents had no chance to be considered for most of the jobs, which "were foreordained to be filled by white bricklayers" from Dacies' all-white list (Pet. App. A8). The court concluded: "[V]is-a-vis the white bricklayers employed in 84–87 percent of the jobs, racial discrimination is established under the principle of *McDonnell Douglas*" (Pet. App. A8–A9).[9]

SUMMARY OF ARGUMENT

Both the district court and the court of appeals erred in treating the claims of the three respondents as identical. Although each respondent is a black bricklayer with proven competence, and each was unable to secure employment on the Interlake job by applying at the gate, a crucial factual difference distinguishes Smith's and Samuels' claim from Nemhard's. Smith and Samuels had each worked with

[9] The court of appeals held that the district court erred in excluding plaintiffs' evidence that the labor force was 13–14 percent black (Pet. App. A9). But the court of appeals concluded that this error was not prejudicial inasmuch as black representation on the Interlake job compared favorably with this statistic (*ibid.*). The court of appeals noted that it did not rely on any alleged statistical imbalances in finding that Furnco had discriminated against the plaintiffs (*ibid.*), because (Pet. App. A8):
"Where the percentage of minority members in a workforce is lower than the group considered, that fact may well indicate the operation of racial discrimination. Absence of such discrimination is not proved by the percentage in the workforce being higher than the percentage in the group considered."

Dacies on earlier Furnco jobs but were excluded from his (all-white) hiring list; Nemhard had never worked with Dacies or Furnco. An analysis taking into account this factual difference shows that Smith and Samuels suffered racial discrimination in violation of Title VII but Nemhard did not.

A. Respondents Smith and Samuels established a *prima facie* case of racial discrimination based upon their exclusion from Dacies' list of qualified bricklayers with whom he had previous working experience. Smith and Samuels had both worked with Dacies on prior Furnco jobs. Both had demonstrated their competency, and Smith had even supervised Dacies on a prior job. Nevertheless, neither Smith nor Samuels was on Dacies' list, which contained only the names of white persons. Bricklayers whose names appeared on Dacies' list were called directly to work by the superintendent. Since Smith's and Samuels' names did not appear, they did not have the same employment opportunity afforded to similarly situated white bricklayers who had worked with Dacies. The all-white composition of Dacies' hiring list, particularly when coupled with the totally subjective process by which it was compiled, is *prima facie* evidence of intentional discrimination against black bricklayers, including Smith and Samuels, who had worked with Dacies and Furnco. *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 337–342 and n. 23; *Castaneda* v. *Partida*, 430 U.S. 482, 494–499.

Furnco presented no evidence to rebut this *prima facie* case. No explanation was offered why Smith and

Samuels or other competent black bricklayers were omitted from the supervisor's hiring list, and from the employment opportunity that concededly would have followed from inclusion on the list. Furnco's refusal to take applications at the gate, while perhaps a legitimate nondiscriminatory policy, is not dispositive of the claims of Smith and Samuels, whose applications at the gate merely emphasize their availability to accept the employment opportunities offered to white bricklayers who had worked with Dacies. Nor is the individual injury which they suffered as a result of discrimination negated by Furnco's hiring of other black bricklayers through other mechanisms. Both Smith and Samuels are entitled to Title VII relief because they presented an unrebutted *prima facie* case based upon their discriminatory exclusion from the supervisor's list and the resulting failure of Furnco to offer them early employment at the Interlake ~~Plate~~ job. See *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273, 281–283.

B. The claims of respondent Nemhard have a completely different factual basis and require a separate disposition under Title VII. Unlike the claims of Smith and Samuels, the claim of Nemhard has no connection with the racial composition of Dacies' hiring list. Nemhard never worked with Furnco or Dacies and could not possibly have appeared on Dacies' list of persons with whom he had previously worked. Nemhard's claim of discrimination is based upon the alleged illegality of Furnco's refusal to take applications at the gate.

By demonstrating that he was qualified, applied, was rejected, and that other bricklayers were hired in his stead, Nemhard made out a *prima facie* case of racial discrimination. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802. Furnco proved that it did not consider any written or job site applications for the Interlake job, but hired only bricklayers known by or recommended to its job superintendent. An employer of highly skilled craftsmen may reasonably assume that a hiring by reference policy will enhance the overall quality of its workforce. Firsthand knowledge of an employee's past performance is a reasonable measure of future performance, and employers of skilled craftsmen may understandably weight their employment decisions in favor of their own knowledge of the past performance of individuals rather than depend on the recommendations of strangers. See *Waters* v. *Wisconsin Steel Works of International Harvester Co.*, 502 F. 2d 1309, 1320 (C.A. 7). Here, in findings that are not clearly erroneous, the district court found Furnco's reasons for rejecting applications at the Interlake job justified by the evidence. Thus, on this record, Furnco met its burden of rebuttal under *McDonnell Douglas* v. *Green, supra.*

Our conclusion that Title VII does not as a *per se* matter require employers to abandon a "hiring from within" policy, does not mean that such policies are insulated from Title VII scrutiny in their application. As with subjective hiring practices generally, such a policy is unlawful if it is discriminatorily ap-

plied or has an exclusionary effect on minorities. See *Gates* v. *Georgia-Pacific Co.*, 492 F. 2d 292 (C.A. 9). Furnco's hiring policy was not discriminatorily applied against Nemhard because he had never worked for Dacies or Furnco and because no outside applicant, of any race, was hired on the Interlake job. Similarly, Nemhard failed to prove that the rejection of outside applicants was a pretext for racial discrimination. Blacks were hired on the Interlake job in a proportion at least comparable to their apparent representation in the labor force. Of course, even if applied neutrally, a "hiring from within" policy would be vulnerable under Title VII if it had an exclusionary effect on minorities. See *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 429–431. However, such a challenge must be premised on a showing that the practice did exclude minorities disproportionately. See *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425. Minorities were not shown to have been disproportionately excluded from the Interlake job. Since Nemhard has not shown that Furnco's hiring practices were intentionally discriminatory against him or had an exclusionary effect on minorities as a class, his rejection was not shown to be the product of unlawful discrimination.

ARGUMENT

THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE AFFIRMED AS TO RESPONDENTS SMITH AND SAMUELS BUT REVERSED AS TO RESPONDENT NEMHARD

All three respondents are blacks who have worked as bricklayers from between 17 and 30 years, who have

prior experience in firebrick work, and who took every reasonable step to make known their desire to work at Furnco's Interlake job. Although the applications of all three were rejected, the district court and the court of appeals were in error in treating their claims as identical. The respondents are not similarly situated. Smith and Samuels had worked with Dacies on Furnco jobs, but were omitted from his list of competent bricklayers with whom he had previously worked and thereby denied otherwise virtually certain employment on the Interlake job. Nemhard never worked for a Furnco supervisor and his sole claim is that the refusal to take his application at the gate was the result of discrimination.

A. FURNCO FAILED TO SHOW A LEGITIMATE NON-DISCRIMINATORY REASON REBUTTING THE INFERENCE OF RACIAL DISCRIMINATION ARISING FROM THE EXCLUSION OF ALL BLACK BRICKLAYERS FROM ITS HIRING SUPERVISOR'S LIST AND THE RESULTING FAILURE TO OFFER EMPLOYMENT TO SMITH AND SAMUELS

Respondents Smith and Samuels established a *prima facie* case of discrimination based upon their exclusion from Dacies' list of qualified bricklayers with whom he had previous working experience. Smith had been a bricklayer for 30 years, while Samuels had 17 years' experience. Both had extensive experience in firebrick work. Both had worked on prior Furnco jobs with Dacies, and Smith had even supervised Dacies. Both bricklayers had therefore demonstrated their competence in service with the Furnco supervisor charged with the hiring for the Interlake job.

Bricklayers who had worked competently on earlier firebrick jobs with Furnco's superintendents did not have to apply for work when a new job began. Under the company's hiring policy, they were called directly by the superintendent, who maintained a hiring list for that purpose. On the Interlake job, the list was compiled and utilized by Dacies, who determined according to his own personal judgment which of his prior employees would be called to work. Such a hiring system, controlled by the unreviewable and subjective judgment of one man, is susceptible of discriminatory abuse. *Castaneda* v. *Partida,* 430 U.S. 482, 497. The potential for discriminatory application has been realized in this case; for although Dacies had concededly worked with Smith and Samuels as well as other black bricklayers in the past, his hiring list consisted only of white persons.

The all-white composition of Dacies' hiring list, particularly when coupled with the totally subjective process by which it was compiled, is *prima facie* evidence of intentional discrimination against black bricklayers, including Smith and Samuels, who had worked with Dacies and Furnco. *International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324, 337–342 and n. 23; *Castaneda* v. *Partida, supra,* 430 U.S. at 495–499. See *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.,* 429 U.S. 252, 266; *Yick Wo* v. *Hopkins,* 118 U.S. 356, 369–

374.[10] Furnco presented no evidence to rebut this *prima facie* case. Although Dacies testified, he did not attempt to explain why his hiring list was all-white or why Smith and Samuels were omitted from it.[11]

It is undisputed that Dacies had worked with black bricklayers on firebrick jobs; no claim has been made, let alone proven, by Dacies or Furnco that every black bricklayer with whom Dacies worked was less competent than the whites on his list. Indeed, given the conceded qualifications of Smith (who actually

[10] The courts of appeals have repeatedly recognized that while subjective evaluations of supervisors are not *per se* unlawful under Title VII, they provide "a ready mechanism for discrimination." *Rowe* v. *General Motors Corp.*, 457 F. 2d 348, 359 (C.A. 5). See also, *e.g.*, *Reed* v. *Arlington Hotel Co., Inc.*, 476 F. 2d 721, 724 (C.A. 8), certiorari denied, 414 U.S. 854. When those subjective evaluations are applied in a manner which results in significant racial disparities, there is *prima facie* evidence of a violation of Title VII. *Rowe* v. *General Motors Corp.*, *supra; Brown* v. *Gaston County Dyeing Machine Co.*, 457 F. 2d 1377, 1382 (C.A. 4), certiorari denied, 409 U.S. 982; *United States* v. *Bethlehem Steel Corp.*, 446 F. 2d 652, 655 (C.A. 2); *Equal Employment Opportunity Commission* v. *Detroit Edison Co.*, 515 F. 2d 301, 313 (C.A. 6), vacated and remanded on other grounds, 431 U.S. 951; *Baxter* v. *Savannah Sugar Refining Corp.*, 495 F. 2d 437 (C.A. 5), certiorari denied, 419 U.S. 1033. See generally B. Schlei & P. Grossman, *Employment Discrimination Law*, Ch. 6 (1976).

[11] It appears from Dacies' testimony that the exclusion of blacks from his hiring list was his standard procedure. Before the Interlake job, Dacies had called *at most* two black bricklayers for work during his entire career as a firebrick superintendent (see n. 5, *supra*).

supervised Dacies on one job) and Samuels, such a claim would have been frivolous. The burden was on Furnco "to dispel the inference of intentional discrimination" (*Castaneda* v. *Partida, supra,* 430 U.S. at 497–498), and that burden was not met.

Thus, Smith's and Samuels' claims do not turn on the legitimacy of Furnco's refusal to accept applications at the gate. While Smith and Samuels did appear at the Interlake job site and did request employment, their efforts at the gate are merely evidence of their availability to accept the employment opportunities offered to competent white bricklayers who worked with Dacies, but withheld from similarly situated black bricklayers. Both black bricklayers were similarly situated to white bricklayers who had worked with Dacies and Furnco and who did not have to apply for the Interlake job but were called directly. If Dacies had not discriminated on racial grounds in compiling the hiring list, that list would have contained the names of competent black bricklayers including Smith and Samuels and, as Dacies acknowledged, those black bricklayers would have been hired for the Interlake job. Smith and Samuels have therefore made out an unrebutted *prima facie* case that they were denied the opportunity to be hired from Dacies' list because of their race. See *McDonald* v. *Santa Fe Trail Transportation Co.,* 427 U.S. 273, 281–283.

Furnco is not exonerated from liability to Smith and Samuels because its overall hiring of black bricklayers on the Interlake job compares favorably with

the available labor pool. This is not a class action in which it is contended that blacks as a group were treated worse than whites as a group. The question is whether two blacks, as individuals, were treated differently from similarly situated whites because of their race. Smith and Samuels were denied the opportunity to be hired at the beginning of the Interlake job because of Dacies' discrimination against black bricklayers who had worked with him and Furnco. This overt discrimination suffered by two individuals did not disappear simply because Dacies, having been instructed to hire some blacks on the Interlake job, obtained the names of *other* black bricklayers and hired them.

Our conclusion that Smith and Samuels are the victims of purposeful discrimination is not impaired by the district court's finding that Furnco's hiring practices at the Interlake job were racially neutral and were not applied pretextually against black bricklayers (Pet. App. A18). The district court disposed of the claims of all three respondents in a unitary fashion without regard to the factual differences that distinguished their claims or their differing posture with respect to Furnco's hiring processes. Thus the district court held that Smith's and Samuels' claims were sufficiently answered by the legitimate policy of refusing to take applications at the gate even though similarly situated white bricklayers were hired without any application whatsoever (Pet. App. A17–A18). The district court overlooked entirely the all-white composition of Dacies' hiring list and did not con-

sider Smith's and Samuels' right to be treated the same as white bricklayers who had worked with Dacies and Furnco.

Although the error of both the district court and the court of appeals in failing to analyze the Title VII claims of Smith and Samuels in light of their special posture with respect to Dacies' all-white hiring list may in part be attributable to respondents' emphasis on the alleged illegality of Furnco's practice of rejecting applications "at the gate," we do not believe that this is an appropriate case for a remand. Respondents did argue in the courts below that Dacies discriminatorily excluded blacks such as Smith and Samuels from his list of past qualified employees.[12] This issue was fully litigated and all of the facts necessary for an appropriate determination have been elicited.[13] We therefore believe that the question should be decided by this Court. Whether there was purposeful discrimination against these respondents is a question of ultimate fact to be determined by an evaluation of evidentiary facts according to governing legal standards. See, *e.g., Castaneda* v. *Partida,*

[12] See Brief for Plaintiffs-Appellants 21–26; Reply Brief for Plaintiffs-Appellants 5 n. 5.

[13] Dacies testified that his hiring list was all white (see p. 3, *supra*). He did not offer any legitimate explanation for this fact and conceded that he had worked with competent black bricklayers. Petitioner has never suggested that the white bricklayers on Dacies' list were more competent than every black bricklayer with whom he worked. This is not surprising in light of Smith's qualifications (see p. 5, *supra*). If there is any plausible nonracial hypothesis for the total exclusion of blacks from the list, Furnco has not advanced it.

supra; Norris v. *Alabama,* 294 U.S. 587; *Causey* v. *Ford Motor Co.,* 516 F. 2d 416 (C.A. 5). Cf. *Baumgartner* v. *United States,* 322 U.S. 665, 670–671. The evidentiary facts relating to Smith's and Samuels' claims have been found and are not disputed on this record; the conclusion of disparate treatment based on race follows as a matter of law.

B. FURNCO'S PRACTICE OF HIRING ONLY BY SUPERVISOR'S REFERENCE WAS PROPERLY FOUND ON THIS RECORD TO BE A LEGITIMATE NONDISCRIMINATORY POLICY REBUTTING THE INFERENCE OF DISCRIMINATION RAISED BY ITS REFUSAL TO ACCEPT THE APPLICATION OF NEMHARD AT THE GATE

Unlike the claims of Smith and Samuels, the claim of Nemhard is unrelated to the racial composition of Dacies' hiring list. Because Nemhard never worked with Furnco or with Dacies, Nemhard's name could not have appeared on Dacies' list of bricklayers who had demonstrated their competence in prior work with him.[14] As a result, Nemhard's claim was wholly dependent upon the alleged illegality of refusing to take the applications of either white or black bricklayers "at the gate." While we believe that Nemhard's claim of rejection at the gate established a *prima facie* case of discrimination, we have concluded that Furnco successfully rebutted the inference of racial discrimination with respect to Nemhard.

Nemhard established a *prima facie* case of discrimination within the meaning of *McDonnell Douglas*

[14] There is no evidence in the record that Nemhard had attempted to secure employment with Dacies or Furnco before he applied for the Interlake job.

Corp. v. *Green,* 411 U.S. 792, 802, by demonstrating that he was a qualified firebrick worker, had applied at the Interlake job for employment, was rejected, and other persons of similar qualifications in firebrick work were hired instead. In a private, non-class action such as this, proof that a qualified minority applicant was denied employment when there were available vacancies will, absent explanation from the employer, create an inference that race was a motivating factor in the rejection. *McDonnell Douglas, supra,* 411 U.S. at 802. Furnco's refusal to hire Nemhard was demonstrably not based on a lack of qualifications or of vacancies. See *International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324, 358 n. 44. Nemhard had made his threshold *prima facie* showing as petitioner acknowledges (Pet. Br. 17), and the burden therefore shifted to Furnco "to articulate some legitimate, nondiscriminatory reason for [Nemhard's] rejection." *McDonnell Douglas Corp.* v. *Green, supra,* 411 U.S. at 802.

In response, Furnco proved that it did not consider any written or job-site applications for the Interlake job but hired instead only bricklayers known by or recommended to its job superintendent. An employer of highly skilled craftsmen may reasonably assume that a hiring by reference policy will enhance the overall quality of its workforce. Firsthand knowledge of an employee's past performance is a reasonable, if not infallible, measure of future performance; and such employers may understandably weight their decisions in favor of their own knowledge of past performance rather than depend on the recommendations of strangers. A policy which favors prior employees over new applicants is not *per se* unlawful under Title VII. See *Waters* v. *Wisconsin Steel Works of International Harvester Co.,* 502 F. 2d 1309, 1320 (C.A. 7) Here, the district court found that such factors as the special skills required at the Interlake job, the speed at which the job was to be done, and the cost to Furnco if the work was faultily completed, prevented Furnco from hiring persons not known by it to be "experienced and highly qualified" or from engaging in "on-the-job training" (Pet. App. A14–A15). While these findings may be subject to dispute, they are not clearly erroneous. Thus, on the record here, Furnco met its burden of rebuttal under *McDonnell Douglas.*[15] The

[15] *McDonnell Douglas* does not identify the precise nature of the burden which is shifted to the employer to rebut the individual's *prima facie* case. We believe that the employer has the burden of showing both what its reasons are for rejecting the application and that those reasons are legitimate, *i.e.*, that they grow out of the needs of its business. The employer, in our view, bears the burden of persuasion on both issues. Here, the complainant has proven that the two most common legitimate reasons for rejection (lack of vacancies and qualifications) do not apply. See *Teamsters, supra,* 431 U.S. at 358 n. 44. If there is a legitimate reason, it rests within the employer's knowledge; and the employer also possesses the evidence to support that reason factually. Cf. *id.* at 359 n. 45. The courts of appeals have correctly construed *McDonnell Douglas* as placing on the employer the burden of production and the risk of non-persuasion on the articulated reason for rejection. See, *e.g., Ostapowicz* v. *Johnson Bronze Co.,* 541 F. 2d 394, 399 (C.A. 3); *Causey* v. *Ford Motor Co.,* 516 F. 2d 416, 422–423 (C.A. 5); *Holthaus* v. *Compton & Sons, Inc.,* 514 F. 2d 651 (C.A. 8); *Vulcan Society of the New York City Fire Department, Inc.* v. *Civil Service Commission of New York,* 490 F. 2d 387, 393 (C.A. 2).

court of appeals therefore erred in holding that Furnco did not establish a legitimate reason, unrelated to race, to justify Nemhard's rejection.

Furnco's facially legitimate policy is not immune from scrutiny in its application. The facially neutral policy of hiring only by supervisor's reference would be unlawful if applied with racially discriminatory purpose or effect. But the facts of this case do not support the apparent view of the court of appeals that Furnco's policy of not considering written or job-site applications was applied discriminatorily against black applicants. No applicant "at the gate," white or black, was considered for employment at Interlake. The refusal to accept applications does not appear to have been motivated by a desire to maintain an all-white work force. Indeed, hiring was not restricted to the all-white list; Dacies also hired black bricklayers who were recommended to him, and black representation on the job compares favorably with that in the apparently available labor force.[16] Respondents

[16] The court of appeals correctly held that the district court erred in excluding respondents' evidence concerning the racial composition of the available labor force but that this error was not prejudicial. Blacks were not under-represented on the Interlake job whether the available labor force is 5.7 percent black, as contended by petitioner, or 13–14 percent black, as contended by respondents. As we have noted (*supra*, p. 4), three blacks were among the twenty bricklayers hired during the first three weeks of the Interlake job. We would view Nemhard's claims very differently if Dacies had filled all of the early positions with whites, while at the same time rejecting new applicants, and then hired blacks only during the tail-end portion of the job. Under those circumstances, it could be concluded that Furnco's policy of rejecting applicants was designed to reserve the best long-term jobs for whites.

did not prove that the company placed an artificial ceiling on the number of blacks it would hire. Respondents thus did not show that Furnco's policy of rejecting new applications was a pretext for racial discrimination against black applicants without prior experience. Thus, while experienced black bricklayers like Smith and Samuels were the victims of disparate treatment based upon race, black applicants without prior experience with Dacies or Furnco were not. See *Waters* v. *Wisconsin Steel Works of International Harvester Co.*, 502 F. 2d 1309, 1321–1322 (C.A. 7).

Irrespective of motivation, a policy of "hiring from within" may lead to discriminatory results if minorities are under-represented in a company or industry.[17] See *Gates* v. *Georgia-Pacific Corp.*, 492 F. 2d 292 (C.A. 9). The use of a policy that has a disproportionately adverse impact on minorities or which perpetuates the effects of past discrimination violates Title VII unless it is justified by business necessity.[18]

[17] Congress "intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin." *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 763. See also, *e.g.*, *Nashville Gas Co.* v. *Satty*, No. 75–536, decided December 6, 1977; *Dothard* v. *Rawlinson*, 433, U.S. 321, 328–329.

[18] In contrast, an individual who suffers purposeful discrimination need not prove that other members of the group to which he belongs were also the victims of discrimination. Of course, one method of establishing purposeful discrimination against individuals is by proving that the employer engaged in a pattern of

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But this is not an industry-wide lawsuit, and respondents did not challenge Furnco's hiring policy at any job except Interlake. On that job, there has been no showing that Furnco's policy of rejecting applications resulted in the disproportionate exclusion of black bricklayers or perpetuated the effects of past discrimination.[19] Nemhard did not demonstrate, for example, that at the time of the Interlake job, unemployed black bricklayers constituted substantially more than 13 percent of the pool of competent bricklayers available to work for Furnco. The record therefore does not disclose that the facially neutral employment practice of hiring only by supervisor's reference in fact had any disparate effect on a group of which Nemhard is a member. See *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425; *Dothard* v. *Rawlinson*, 433, U.S. 321, 328–331.[20]

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class-wide discrimination. Such proof creates a rebuttable presumption that individual members of the class were in fact victims of discrimination. *Teamsters*, *supra*, 431 U.S. at 358–362; *Franks* v. *Bowman Transportation Co.*, *supra*, 424 U.S. at 772.

[19] The potential impact of a reference system of hiring in perpetuating past discrimination is emphasized by the experience of Nicholas Popovic, the president of the bricklayers' local which covers Cook County, who worked in the bricklaying industry for 35 years before becoming a union official (Tr. 22–25). Mr. Popovic was a supervisor on many jobs, and his standard hiring practice was to call directly experienced firebrick workers from a list which he maintained (Tr. 47–49). Mr. Popovic never worked with a black bricklayer on a firebrick job either as a supervisor or as a bricklayer (Tr. 57).

[20] See *Teamsters*, *supra*, 431 U.S. at 348–350; *Griggs*, *supra*, 401 U.S. at 429–431.

In the absence of proof of discriminatory treatment or effect, the availability of alternative hiring practices does not render Furnco's policy of rejecting applicants at the gate unlawful. The court of appeals concluded that a policy of accepting written applications and checking recommendations is both "reasonable" and "feasible" (Pet. App. A6), a conclusion that would be highly relevant, and perhaps dispositive, if Furnco had the burden of justifying its existing practice as a business necessity. See, *e.g.*, *United States* v. *Bethlehem Steel Corp.*, 446 F. 2d 652, 662 (C.A. 2); *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791, 799–800 (C.A. 4), certiorari denied, 404 U.S. 1006. But the business necessity defense arises only upon a showing that the challenged practice has an adverse impact on racial or other prohibited grounds; that showing has not been made.[21] Furnco's only burden was to demonstrate that the alternative it chose was legitimate and nondiscriminatory. *McDonnell Douglas* v. *Green*, *supra*, 411 U.S. at 802. That burden was met, and in these circumstances, the availability of a feasible alternative did not require, or in itself permit, the district court to find a Title VII violation.[22]

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[21] For this reason, it is unnecessary to determine whether the district court erred in concluding that Furnco's practices "were justified as a business necessity in that they were necessary for the safe and efficient operation of Furnco's business" (Pet. App. A20–A21).

[22] Respondents did not show that the alternative practice advocated by the court of appeals would have resulted in a greater representation of blacks on the Interlake job—a showing which might indicate that Furnco's practice of rejecting applicants was a pretext for discrimination. See *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 425.

CONCLUSION

The judgment of the court of appeals should be affirmed as to respondents Smith and Samuels and reversed as to respondent Nemhard.

Respectfully submitted.

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MARCH 1978.

U.S. GOVERNMENT PRINTING OFFICE: 1978